

IN THE SUPREME COURT OF FLORIDA

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Case No. SC07-2402

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THE SCHOOL BOARD OF PALM BEACH COUNTY,

Petitioner,

v.

SURVIVORS CHARTER SCHOOLS, INC.,

Respondent.

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On Appeal from the District Court of Appeal of the State of Florida,  
Fourth District, Case Nos. 4D06-2378 & 4D06-2379

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF NEITHER PARTY**

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## INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure 9.370, Pacific Legal Foundation (PLF) respectfully submits this brief Amicus Curiae in support of neither party. Counsel for Petitioner and counsel for Respondent consent to PLF's participation as Amicus Curiae. Pursuant to Rule 9.370(a), a motion for this Court's leave to file accompanies PLF's submission of this brief.

## IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation was founded thirty-five years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Headquartered in Sacramento, California, with regional offices including its Atlantic Center in Stuart, Florida, PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as amicus curiae before the United States Supreme Court and other courts in cases concerning educational issues such as *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1* and *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006), *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125



(1999), and *McLaughlin v. State Bd. of Educ.*, 75 Cal. App. 4th 196 (1999). PLF participated as amicus curiae before this Court on the issue of the constitutionality of the state's voucher program in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), and on numerous other matters, including *Florida Dep't of Env'tl. Prot. v. Stop the Beach Renourishment, Inc.*, Case No. SC 06-1449, currently before the Court.

PLF seeks to aid the Court by providing additional perspective and background on the broader issues affecting Florida's charter schools, including their academic successes and structural advantages when compared to traditional public schools. PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint, apart from those of the parties, on the issues presented in this case.

### **SUMMARY OF ARGUMENT**

Traditional public schools across America are failing to educate their students properly. Dan Lips, *A Nation Still at Risk: The Case for Federalism and School Choice*, The Heritage Foundation, Apr. 21, 2008, at 1.<sup>1</sup> Charter schools are a remarkably successful alternative to traditional public schools and should be kept free from the administrative burdens that continually undermine the public school system's ability to function. *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125,

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<sup>1</sup> Available at <http://www.heritage.org/Research/Education/bg2125.cfm> (last visited Apr. 24, 2008).

1130 (1999). Indeed, it largely is the absence of such overregulation that enables charter school programs, including Florida's, to prove so effective at educating students. Moreover, charter schools have a positive impact on traditional public schools by injecting competition into the educational marketplace. Paul Teske, et al., *Does Charter School Competition Improve Traditional Public Schools?*, Manhattan Institute Center for Civic Innovation Civic Report, No. 10, June 2000, at 1 (Teske).<sup>2</sup>

Thus, burdening charter schools with the Administrative Procedure Act, or any other time consuming and costly regulations outside of the Charter School Act conflicts with the express intent of the Florida Legislature and undermines the policies supporting charter schools. The Charter School Act provides for its own termination procedures and its drafters intentionally excluded the provisions of the Administrative Procedure Act. Fla. Stat. § 1002.33(8).

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<sup>2</sup> Available at [http://www.manhattan-institute.org/html/cr\\_10.htm](http://www.manhattan-institute.org/html/cr_10.htm) (last visited Apr. 24, 2008).

## ARGUMENT

### I

#### CHARTER SCHOOLS EFFECTIVELY EDUCATE THEIR STUDENTS

Alternatives to the traditional public education system, such as charter schools, offer significant benefits to students availed of these choices. Much of this success is attributed to charter schools' freedom from the burden of "the complex tangle of rules sustaining our public school system [that has] the potential to sap creativity and innovation, thwart accountability and undermine the effective education of our children." *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1130 (1999). Included in this "tangle" are administrative requirements such as the state APA, which should not apply to Florida's charter schools.

#### **A. School Choice Is Necessary Because America's and Florida's Traditional Public Education Systems Are Failing Their Students**

In a study published in the same week as the service of the initial brief in this case, education analyst Dan Lips of the Heritage Foundation wrote:

In 1983, the National Commission on Excellence in Education issued the landmark *A Nation at Risk* report highlighting the crisis in American education. The commission reported that American students were at risk of falling behind students from around the world and that this imperiled our national security and future prosperity. "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today," the commissioners wrote, "we might well

have viewed it as an act of war.” . . . Twenty-five years later, the American education system remains in a state of crisis.

Dan Lips, *A Nation Still at Risk: The Case for Federalism and School Choice*, The Heritage Foundation, Apr. 21, 2008, at 1 (hereinafter Lips).<sup>3</sup> While some would be tempted to dismiss Lips’s assessment, and the report it cites, as hyperbole, raw statistics, regrettably, illuminate his observation. Citing federal data published in March, 2008, Lips reports that one-third of America’s fourth-grade students are considered to read at a “below basic” level, with the number rising to a full one-half among those considered economically disadvantaged. Lips at 1.

A study from earlier this decade paints an even bleaker picture for students classified as ethnic minorities. Sixty-three percent of black fourth-graders, and 56% of Hispanics, test at “below basic” proficiency in reading. National Center for Education Statistics, *The Nation’s Report Card: Fourth-Grade Reading 2000* (2001), at 31, 33.<sup>4</sup> As these students get older, their success is similarly stunted. Just more than half of black and Hispanic students graduate from high school, a number that plummets south of one-third (Indianapolis) or one-quarter (Detroit) in

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<sup>3</sup> Available at <http://www.heritage.org/Research/Education/bg2125.cfm> (last visited Apr. 24, 2008).

<sup>4</sup> Available at <http://nces.ed.gov/naep3/pdf/main2000/2001499.pdf> (last visited Apr. 24, 2008).

some of America's biggest cities. Lips at 2-3. The personal and societal costs of the education system's failure of the nation's youth are both obvious and devastating. Lips at 3-4 (quantifying the individual and collective costs of public education failure).

**B. Unburdened by the Bureaucracy Governing Traditional Public Schools, Charter School Programs Evidence Remarkable Success**

**1. Charter Schools Are Outperforming Their Non-Charter Public School Counterparts**

In the early 1990's, lawmakers in states across the nation began to recognize that something needed to be done to address the failure of the traditional public education model. More money was not the answer, as the infamous Kansas City experiment had shown. There, a federal court ordered the Kansas City School District to conceive an educational plan with money as no object; whatever the school officials wanted, taxpayers would be forced to fund. Paul Ciotti, *Money and School Performance: Lessons from the Kansas City Desegregation Experiment*, Cato Policy Analysis No. 298 (1998), at 1 (hereinafter Ciotti).<sup>5</sup> The district responded by spending more money per pupil, adjusted for cost-of-living, than any other large city in America, on luxuries ranging from on-site television studios to international field trips to the lowest student-teacher ratio in the nation.

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<sup>5</sup> Available at <http://www.cato.org/pubs/pas/pa-298.pdf> (last visited Apr. 24, 2008).

*Id.* And, “[t]he results were dismal. Test scores did not rise [and] the black-white gap did not diminish.” *Id.* Indeed, many legislators across America, including those in Florida, realized that “educational programs can’t be solved by throwing money at them [and] that the structural problems of our current educational system are far more important than a lack of material resources.” *Id.*

The alternative adopted in Florida and elsewhere was a charter school program. Charter schools are independent public schools that operate free from most state laws and regulations so that they have the flexibility to employ creative educational approaches to improve student learning. Such was the explicit purpose of Florida’s charter school program, enacted into law in 1996 with a statutory mandate to “meet high standards of student achievement while providing parents flexibility to choose among diverse educational opportunities within the state’s public school system” by encouraging innovation and requiring empirical accountability. Fla. Stat. § 1002.33(2) (2007).

Stories of charter school success are legion. Across America, in forty states and the District of Columbia, nearly 4,000 charter schools educate more than a million students. Center for Education Reform, *Annual Survey of America’s Charter Schools* (2007), at 2 (hereinafter CER Study).<sup>6</sup> A compendium of thirty-

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<sup>6</sup>Available at [http://www.edreform.com/\\_upload/cer\\_charter\\_survey.pdf](http://www.edreform.com/_upload/cer_charter_survey.pdf) (last visited Apr. 24, 2008).

nine individual studies measuring the performance of students in charter schools over time found that fully thirty of these studies reported students in charter schools making educational gains that exceeded those of their counterparts in similar public schools. National Alliance for Public Charter Schools, *Charter School Achievement: What We Know* (2007), at 2, 9-10 (hereinafter NAPCS Study).<sup>7</sup> This success has not gone unnoticed by parents; the CER Study reports that 61% of responding charter schools reported significant waiting lists averaging 150 students in length. CER Study at 2.

Individual charter school district success stories are the rule rather than the exception. In Chicago, thirteen out of fifteen charter schools evidence student gains outpacing those of the city's public schools on measures ranging from "reading and math scores to attendance and dropout rates." Gary Landry, *Teacher Supply and Free Markets: Why Not?*, The Journal of the James Madison Institute (Spring 2005), at 52 (Landry).<sup>8</sup> Lest Chicago be seen as a small-scale anomaly, a look at the nation's largest charter school program, in California, reveals similar success. A 2002 study found that "California charter schools are doing a better job of improving the academic performance . . . of California's most at-risk students,

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<sup>7</sup> Available at <http://www.publiccharters.org/content/publication/detail/2974/> (last visited Apr. 24, 2008).

<sup>8</sup> Available at <http://www.jamesmadison.org/pdf/materials/359.pdf#page=54> (last visited Apr. 24, 2008).

those who are low income, rather than non-charter California public schools.” Simeon P. Slovacek, Ph.D., et al., *An Analysis of the Academic Performance Index*, Charter College of Education (2002), at ii.<sup>9</sup> “Student achievement . . . in California’s low-income charter schools is, on average, improving at a faster rate than in similar non-charter schools.” *Id.* Statistics support these claims, showing that charter schools are improving their standardized test scores at a higher rate than conventional schools.” *Id.* at 3. These positive results were echoed in a study by the Hoover Institution at Stanford University, which found that charter schools were significantly improving the scores of low-achieving high school students at a faster rate than traditional public schools. Margaret E. Raymond, *The Performance of California Charter Schools*, Center for Educational Outcomes, Hoover Institution, Stanford University (2005), at 18.<sup>10</sup>

## **2. Charter Schools, Including Florida’s, Thrive in the Absence of Oppressive Government Intrusion**

Florida’s charter schools, at issue in this case, are not immune from this widespread success. To the contrary, they are a prime example of it. The Center for Education Reform ranks Florida’s charter school law, governing

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<sup>9</sup> Available at [http://www.calstatela.edu/academic/ccoe/c\\_perc/rpt1.pdf](http://www.calstatela.edu/academic/ccoe/c_perc/rpt1.pdf) (last visited Apr. 24, 2008).

<sup>10</sup> Available at [http://credo.stanford.edu/downloads/ca\\_chart\\_sch.pdf](http://credo.stanford.edu/downloads/ca_chart_sch.pdf) (last visited Apr. 24, 2008).



the state's 379 charter schools, the sixth strongest in the nation. Center for Education Reform, *Florida Charter Law*.<sup>11</sup> The law's strength has manifested itself in the form of considerable academic achievement. The National Alliance for Public Charter Schools reports that studies of Florida's charter schools are unanimous in finding overall academic gains in charter schools greater than those in traditional public schools, NAPCS Study at 9, with specific gains revealed when comparing the performance of at-risk high school students, *id.* The Center for Education Reform also cites a study of the Manhattan Institute showing charter school students in Florida scoring an average of six points better on standardized tests when compared to students in non-charter public schools. Center for Education Reform, *Charter Schools Through an Economist's Lens: Top Ten Economic-Based Research Studies* (Apr. 25, 2005), at 1.<sup>12</sup>

While it is important to examine how well charter schools and their students have performed, it is perhaps more crucial—from a public policy standpoint, and for the purposes of the instant case—to look at *why* these successes have been realized. Again revealing the disconnect between funds and academic success, it's not money; in fact, on average charter schools “spend less and receive fewer

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<sup>11</sup> Available at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=2804&sectionID=74&NEWSYEAR=2008> (last visited Apr. 24, 2008).

<sup>12</sup> Available at <http://www.edreform.com/index.cfm?fuseAction=document&documented=2036> (last visited Apr. 24, 2008).

dollars than conventional schools.” CER Study at 4. Charter schools spend an average of \$1,100 dollars less per student than do traditional public schools, and receive an average of almost \$3,000 less in funding. *Id.*

The answer to the question of why charter schools are so comparatively effective appears nearly as agreed upon as the statistical reality of that effectiveness: charter schools are able to thrive because they are not burdened by the types and levels of administrative and bureaucratic red tape that destroyed public schools and necessitated the charter school alternative in the first place. CER Study at 4; NAPCS Study at 10; Ciotti at 15; Lips at 7-8. The time not spent on such requirements is most readily (and productively) spent on increased instructional time as compared with traditional schools. CER Study at 4. Other newly-liberated time is spent on ensuring accountability, another area where—despite the testing requirements of the federal No Child Left Behind Act—charter schools far outpace their counterparts. *Id.* Already overburdened by byzantine federal requirements such as No Child Left Behind and Title I, *see* Lips at 7-8, traditional public schools have their administrative problems exacerbated by what often is more onerous state oversight. Charter schools, largely, face no such obstacle to academic success.

The “money is no object” disaster in Kansas City illustrates the detrimental effects of over-regulation, and counsels against the importing of such regulatory

burdens into the governance of charter schools. The bureaucratic rules that controlled Kansas City's hiring and dismissal of teachers and principals made it almost impossible to dismiss those educators who were substandard or even incompetent. Ciotti at 15. The structural bureaucracy that oversaw the Kansas City schools was so bloated and required so much money that "less than half the education budget ever made it to the classroom." *Id.* These are not problems unique to Kansas City of a few decades ago; rather, they are the norm for public school systems across America, including in Florida. Without the need to fund a bloated administrative framework, charter schools are able to do *more* with *less* money, as discussed above.

A recent article in the Harvard Journal of Law & Public Policy examines a bureaucracy particularly harmful to traditional public schools—entrenched teacher unions—and how importing the current laws and regulations that govern them into the charter school context would significantly cabin the successes charter schools have shown. Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 Harv. J. L. & Pub. Pol'y 885, 886-89 (2007). Charter schools enjoy wide-ranging appeal because the charter school structure brings together three important motivations: the revolt against bureaucratization, the introduction of choice or

market mechanisms in public schooling, and increasing teacher professionalism.”

*Id.*

Malin and Kerchner’s critique of the teacher union bureaucracy, and its deleterious impact on public schools, is all the more potent because they personally remain skeptical as to whether the charter school movement has been as successful as it could be, or has lived up to its original billing. *Id.* at 889-90.<sup>13</sup> Teachers in charter schools are subject to free market principles and accountability, but teachers in public schools are protected by unions against even rank incompetence. *Id.* at 894-95. While charter school teachers work longer hours than traditional public school teachers, and lack bulletproof job security, charter schools have more teacher applicants than they can hire. Freed from the oppressive weight of layers upon layers of imposed general curricula standards and generic lesson plans, “teachers were attracted to charter schools because they could work in an environment that supported a pedagogy and philosophy of education they believed in.” *Id.* at 895. In sum, “charter schools are perceived as bastions of teacher empowerment and traditional public schools are perceived as highly bureaucratized.” *Id.* The Legislature’s decision to displace some small portion of

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<sup>13</sup> See also *id.* at 932-33, discussing collective bargaining law as it pertains to Florida charter school teachers, and commenting generally that charter schools laws sought to “unshackl[e] schools from the bureaucratic control of school district hierarchies and restrictive work rules” with mixed results.

the bureaucratized public school system with charter schools should not be undermined by importing the APA into Florida's Charter School Act.

**C. Students in Traditional Public Schools Benefit from the Presence of Charter Schools in Their Districts**

“[O]ne of the most important issues of the many raised by the charter school explosion is the extent to which charter schools affect the behavior of traditional public schools by competing with them for students.” Teske at 1. Charter schools move incrementally closer to an education regime that would operate as most other American enterprises do—based on competition where “[s]chools would be required to meet the specific needs of the open education market and parents, the consumers in this market, would ultimately decide whether the school is succeeding” and enroll their children accordingly. Landry at 52. As an additional benefit, “rigorous competition within the public school district [designed] to stimulate continual improvement in all public schools,” Fla. Stat. § 1002.33(2)(b)(2), when measured empirically, actually tends to result in such improvement.

Public schools largely derive their funding on a per-capita basis, so they are loathe to lose enrollment to competitors public or private. The existence of charter schools motivates traditional public schools to increase their proficiency in educating their pupils. A five-year study of public schools in Milwaukee, where

private school vouchers were introduced, saw the city's public school students improve on eleven of fifteen tests when compared to a national sample, with raw percentages increasing in results for all fifteen standardized tests. John Gardner, *How School Choice Helps the Milwaukee Public Schools*, American Educational Reform Council (2002), at iii.<sup>14</sup>

So too does public school performance increase upon the introduction of charter schools to a city or district. A 2006 study of North Carolina schools found that “traditional public schools in North Carolina responded to even the limited competition provided by charter schools by improving their average proficiency rates.” George M. Holmes, et al., *Friendly Competition*, Education Next (Winter 2006), at 67.<sup>15</sup> Similar results were found in a study of schools in Massachusetts, New Jersey, and Washington, D.C., where “many superintendents and principals are responding even to muffled competition by making changes designed to produce more appealing and effective schools.” Teske at 1. Aside from the funding leverage charter schools introduce, “proponents of charter schools argue that [ ] because of their greater freedom and fewer bureaucratic rules, charter schools can be ‘laboratories’ for change and experimentation that will provide

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<sup>14</sup> Available at [www.schoolchoiceinfo.org/data/research/GardnerMPS.pdf](http://www.schoolchoiceinfo.org/data/research/GardnerMPS.pdf) (last visited Apr. 24, 2008).

<sup>15</sup> Available at <http://www.hoover.org/publications/ednext/3213041.html> (last visited Apr. 24, 2008).

examples for the reform of the traditional public schools.” *Id.* at 2. Legislatures, and courts, should hesitate before imposing bureaucratic mandates on charter schools that make them look more like the public schools they are helping to reform.

## II

### **THE CHARTER SCHOOL ACT AND PRIVATE CONTRACTUAL AGREEMENTS GOVERN FLORIDA’S CHARTER SCHOOLS**

The Florida Legislature enacted the Charter School Act with the guiding principles of “providing parents flexibility to choose among diverse educational opportunities.” Fla. Stat. § 1002.33(2)(a)(1). It is no accident that the edict of flexibility is afforded so prominent a place in the Act. It was the absence of flexibility in traditional public schools, owing to burdensome administrative mandates, that necessitated the passage of the Act and the introduction of charter schools to Florida. Incorporating governmental regulation from outside of the Charter School Act and the contractual agreements between charter schools and sponsoring districts not only compromises the flexibility that makes charter schools uniquely effective, it also opens the door for the kind of bureaucratic imposition that has mired traditional public schools in their current state of failure.

The drafters of the Charter School Act included a specific and comprehensive mechanism to govern the termination of a charter school contract.

Fla. Stat. § 1002.33(8). The specific termination procedures differ from the notice and hearing provisions of Florida’s APA. Fla. Stat. § 120.569. The framers of the Charter School Act no doubt were cognizant of the APA, and still they declined to incorporate its provisions. Indeed, the logical reading is that the Legislature purposely intended to provide charter schools with the precise termination procedure that is present in the plain language of the Charter School Act.

The well recognized rule of “*expressio unius est exclusio alterius*” can be applied as a tool for interpreting Fla. Stat. § 1002.33(8), one provision of the Charter School Act. This doctrine dictates that where a statute enumerates the principles and mechanisms by which it is to operate, it is to be construed as excluding from its operation those things not expressly mentioned. This Court long has relied on “*expressio unius est exclusio alterius*” as a reliable principle of statutory construction and interpretation. *See Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000). In addition, one portion of the Charter School Act outside of § 1002.33(8) does include APA protections for charter school employees. Fla. Stat. § 1002.33(4)(a). This section of the Charter School Act provides APA protections for employees who were victims of “unlawful reprisal” because of their employment at a charter school. The inclusion of APA protections in this part of the Charter School Act strongly suggests that the exclusion of APA protections in § 1002.33(8) was a purposeful one. By applying



“expressio unius est exclusio alterius” to the termination procedures of the Charter School Act, it becomes clear that it is not only the plain language of the statute, but also the intent of the Legislature, to exclude APA protections from charter schools faced with termination.

It is easy to infer the policy implications of imposing the APA upon charter school contracts. No longer will poor performance, careless fiscal management, or endangering the health and safety of students result in an immediate termination of a charter school contract. Instead, lengthy quasi-judicial proceedings and unnecessary bureaucratic oversight will thrust the charter school system into a morass of red tape that these schools were introduced to avoid. The flexibility and accountability that allows charter schools to thrive will be replaced with the rigid and staid standards that in large part cause public schools to underachieve. Accordingly, this Court should decline to apply APA procedures to the Charter School Act.

## CONCLUSION

For the foregoing reasons, this Court should not apply Florida's APA to the termination of the state's charter schools, nor read into the Charter School Act similar regulations that will blunt the effectiveness of the charter school system.

DATED: May 1, 2008.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that the font used in this brief is Times New Roman 14 point and is in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: May 1, 2008.

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief Amicus Curiae was furnished to the following via first-class mail, postage prepaid, the 1st day of May, 2008:

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